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In The

Supreme Court of the United States

EAST BAY ASIAN LOCAL DEVELOPMENT CORPORATION, a nonprofit California corporation, et al.,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*[1]

The American Planning Association ("APA") is a non-profit, educational research organization dedicated to advancing state and local land-use planning. With more than 30,000 members and forty-six chapters representing all fifty states, it is the oldest and largest organization in the United States devoted to fostering livable communities through comprehensive land use planning. The California Chapter of the APA has more than 6,000 members.

The APA's Planning Advisory Service conducts research in response to inquiries to its constituent members, including inquires regarding historic landmarking. The APA's staff research director has served on the Advisory Board to the National Trust for Historic Preservation. The APA has filed amicus curaie briefs with the United States Supreme Court and various state courts on behalf of planning interests, and was an amicus curaie in state proceedings below.

The APA and its members have substantial interests in maintaining and encouraging the exercise of local government powers to achieve community planning and historic preservation objectives.

SUMMARY OF ARGUMENT

The American Planning Association supports the arguments of the Petitioners that Section 10(a) of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") is an unconstitutional exercise of the Congressional power to regulate religion. RLUIPA provides for land use planning and historic landmarks preservation. The breadth of RLUIPA's exemption from local historic landmarks ordinances is not a reasonable accommodation of religion. Instead, it violates the Establishment Clause and acts to the detriment of the heritage and well-being of local communities.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION BELOW ALLOWS AN EXEMPTION FROM AN OTHERWISE NEUTRAL LAW OF GENERAL APPLICABILITY THAT GOES FAR BEYOND A REASONABLE ACCOMMODATION OF RELIGION.

A. Historic Landmarks Regulations are Well Accepted Neutral Laws of General Applicability

This Court has continued to endorse the public purposes of historic preservation programs. In the more recent case of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court recognized landmarks preservation as a type of regulation that satisfies the constitutional requirement that land use regulations substantially advance and reasonably relate to legitimate state interests. *Id.* at 835-836.

Landmarks legislation, like zoning legislation, is a neutral law of general applicability. *Penn Central* specifically rejected arguments that landmarks laws, by placing unique burdens on landmark property owners, are distinguishable from zoning laws and historic district legislation. Instead, the Court found that, as in other legislation designed to promote the general welfare, some property owners will always be more burdened than others. *Id.* at 134. Furthermore, the Court advised that any overreaching action by the government in applying landmarks laws can be remedied by the availability of judicial review of a particular decision by government. *Id.* at 133-134.

Indeed, this available remedy has been used for many years by religious organizations. See, e.g., *Society for Ethical Culture in the City of New York v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922 (1980) (upholding landmarks law against complaint of religious organization that designation was confiscatory and interfered with free exercise of religion); *Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 449 U.S. 905 (1991) (concluding that the plaintiff church failed to demonstrate that the property could not be adapted to its charitable

purposes in its claim that historic preservation requirements would prevent the most profitable use of its property); *Society of Jesus of New England v. Boston Landmarks Comm'n*, 409 Mass. 38, 564 N.E.2d 571 (1990) (landmarking applied to interior renovations interfered with religious expression); *First Covenant Church of Seattle v. Seattle*, 120 Wash. 2d 203, 840 P.2d 174 (Wash. 1992) (prevention of the exterior renovation of landmark church is an impermissible interference with free exercise of religion).

B. AB 133's Blanket Exemption Goes Far Beyond A Reasonable Accommodation To Religion.

Unlike the typical landmarks program, which allows for a challenge to the local application of landmark regulations on a case-by-case basis for religious and non-religious properties, AB 133 allows a blanket exemption only for religiously affiliated organizations. The California Supreme Court below acknowledged that this extraordinary benefit to religious organizations was based not on *actual* burdens to the free exercise rights of those organizations, but merely to avoid *potential* burdens. The exemption is not available to other non-religious groups, nor is there any evidence that it alleviates "significant governmental interference" with the free exercise of religion. This is contrary to the teachings of *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

Religious properties can constitute a significant portion of landmark sites, and of sites in the community

generally. See, e.g., *St. Bartholomew's Church*, 914 F.2d at 354 (noting that over 15% of the landmark sites in the City of New York are religious properties). Coupled with the ease with which religiously affiliated organizations under AB 133 may exempt themselves, the reach of this accommodation will vitiate the ability of local governments to protect religious properties as landmarks. Furthermore, if the California decision is allowed to stand, not only landmarks but other zoning regulations generally exempting religious organizations from their reach will surely be enacted throughout the nation, to the detriment of other property owners and communities as a whole.

II. THIS COURT SHOULD ACCEPT CERTIORARI BECAUSE AB 133 EXCESSIVELY ENTANGLES CHURCH AND STATE BY DELEGATING GOVERNMENTAL AUTHORITY.

AB 133 is fundamentally flawed in its delegation of governmental power to "religiously affiliated" organizations, contrary to the requirements of *Larkin v. Grendel's Den, Inc.* , 459 U.S. 116 (1982) and *Board of Educ. of Kyrias Joel Village Sch. Dist. v. Grumat*, 512 U.S. 687 (1996). AB 133's scheme is compellingly similar to that struck down in *Larkin*. There, Massachusetts law permitted churches to object, and thereby veto, licensing of liquor sales on premises located within 500 feet of the church. Like the Massachusetts law, AB 133 "substitutes the unilateral and absolute power of the church for the reasoned decision-making of a public legislative body acting on evidence and guided by standards, on issues with significant

economic and political implications." 459 U.S. at 127. As in *Board of Educ. of Kyrias Joel*, where this Court found that a special school district for a village that was a religious enclave of a strict Judaic sect impermissibly entangled government and religion, AB 133 delegates important discretionary governmental powers to religious bodies.

This delegation is exacerbated by AB 133's failure to provide sufficient guidance to ensure that its provisions do not favor religion. For example, it allows a property owner to identify itself as "religiously affiliated," with no statutory criteria by which its self-identification could be judged. It then permits the property owner to apply its own ideas about such vague and undefined concepts as "substantial", "economic" and "reasonable" use of its property to determine if it will follow the landmarks law. The law provides that there must be some action in a "public forum," but that too is undefined. No assurance exists that this "public forum" will be publicly advertised, that notice will be given to anyone, or that anyone will have an opportunity to attend the meeting, nevertheless speak in opposition to the exemption. Nothing in the statute would prevent a "religiously affiliated entity" from simply announcing its exemption decision in a public place, without giving notice of the proceedings, taking evidence or testimony, allowing attendance by nonmembers, or making a record of the proceedings. The entire process and substance of the determination lies in the control of the self-interested property owner, with absolutely no procedural or substantive protection from abuse of power.

The concept of providing exemptions from regulation for unduly burdened entities is endemic to land use,

zoning and building laws across the United States. 8 E. McQuillin, *Municipal Corporations*, § 25.159-176, pp. 715-827 (3d ed. rev. 1991, 1996 supp.). Because such laws affect individual property interests, the vast majority of such ordinances provide for some degree of exemption from at least some of their requirements. *Id.* at § 25.160-161. Zoning and building regulations may likewise affect First Amendment liberties. For example, zoning ordinances usually regulate signage, and many regulate adult entertainment uses, commercial newsstands and the location of churches. However, the remedy for the protection against undue burdens on those rights has either been the use of a variance or a constitutional challenge to the ordinance, not a flat exemption in the law.

Individualized exemptions, frequently referred to as variances in zoning and building laws, are typically provided for hard cases where a particular parcel, if subjected to the sum total of local ordinances, may be rendered unbuildable or face undue constraints on use for constitutionally protected purposes. Public policy normally dictates that the grant of variances be minimized, because their cumulative effect can destroy any ability to achieve the underlying public purpose served by these ordinances. *Id.* at § 25.162 and 262.

The historic means for providing these variances, however, could not be more different from the provisions of AB 133. First, under historic practice, variance or exemption decisions are not placed in the hands of the regulated property owner, because of the obvious conflict of interest and consequent danger of undermining the public interests served by these laws. Instead, a local

hearing officer or administrator, board of appeals or adjustment, or even the local legislative body itself, will make the decision. Second, local ordinances routinely provide for extensive procedural protections designed to ensure that the decisionmaker is unbiased, and that the regulated property owner and the public receive notice of the hearing, and an opportunity to participate in the hearing. *Id.* at § 25.254-269.

Third, local ordinances usually provide specific substantive criteria under which the decisionmaker may grant a variance. These criteria constitute the basic policy determination of when the equities will favor the property owner, without unduly constraining the achievement of the law's legitimate public purposes. The outcome depends not on whether anyone desires or opposes the variance, but rather whether the applicant has sufficiently made the showing required by statute or ordinance. *Id.* at § 25.267-268 and 272.

In each of these aspects of the normal procedure for exemption from land use, building or zoning ordinances, AB 133 is strikingly dissimilar. In view of the breadth of AB 133 and the few restrictions that are imposed, the discretion it grants for religiously affiliated entities to exempt themselves from the operation of generally applicable law is virtually unfettered. Even assuming that landmarks legislation may burden religious exercise, the legislation crosses the line from a reasonable accommodation of religion to impermissible entanglement of church and state.

CONCLUSION

The American Planning Association requests that Certiorari be granted.

Respectfully submitted,

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